

MAINE STATE HARNESS RACING COMMISSION  
MINUTES OF MEETING  
SEPTEMBER 16, 2016

Conference Room, Gambling Control Board  
Department of Public Safety  
45 Commerce Drive, Augusta, ME

Commission Members Present: William Varney, Chair, Gary Reed, William McFarland, Michael Graham and Alex Willette

Staff Members Present: Ron Guay, AAG, Henry Jennings, Carol Gauthier and Miles Greenleaf

**1. Call the Meeting to Order and Introductions:** William Varney, Chair

**2. Review and Approval of Written Decisions and Orders**

AAG, Guay stated that there is an amended decision and order for Valerie Grondin 2015 MSHRC 087 that reflects changes to page 2 under finding of facts the horses name and under the order was corrected to the Fryeburg Fair. Commissioner Graham made a motion to approve the amended decision and order for complaint number 2015 MSHRC 087. Commissioner McFarland seconded. Vote 4-0.

**3. Appeals of Presiding Judge Decisions:**

- a. Appeal from Ronald Cushing Concerning Complaint Number 2015 MSHRC 070.** Mr. Cushing is appealing the August 25, 2015 decision of Presiding Judge Frank Hall, Jr. in which Judge Hall assessed a \$400 fine for a fourth offense of MSHRC Rule prohibiting excessive or discriminate use of the whip. Ronald Cushing was present and represented himself. AAG, Guay gave Mr. Cushing his oath. AAG, Guay stated that judge's appeals are heard de novo. That means any previous decisions in the case are set aside. You will see and hear evidence of the case and based on what you hear or see today you make a decision. AAG, Guay qualified the Commissioners. The Commissioners responded no to all 3 questions. Mr. Jennings represented Judge Hall. AAG, Guay stated that there was a request from Mr. Hall for a continuance. Mr. Cushing did not agree to the continuance so AAG, Guay denied the request by Judge Hall. AAG, Guay stated that there are no objections by both parties on the procedure. He also stated that the state has to prove the violation. Mr. Jennings presented the following exhibits. Exhibit 1, Notice of Hearing; Exhibit 2, Trainer's License Application; Exhibit 3, Race Program; Exhibit 4, Judges List; Exhibit 5, Judges' Decision; Exhibit 6, Appeal Form; Exhibit 7, Waiver of Hearing and Exhibit 8, Notice of Suspension or Fine. Mr. Cushing had no objection to the exhibits. AAG, Guay admitted the exhibits into the record. Mr. Jennings stated that on August 23, 2015 Mr. Cushing used excessive use of the whip and the state is resting on exhibits 1 through 8. There was no video tape available to the state. Mr. Jennings had no witnesses. AAG, Guay asked Mr. Cushing if he had anything to say. Mr. Cushing made a motion for dismissal based on the lack of evidence and this is the second time he has taken time off to resolve this matter. Commissioner McFarland stated to Mr. Cushing that he did sign a form that there is some admission there of guilt and whether the fine is fair. Mr. Cushing stated that he is a man of his word most of the time and if you had a video tape and he admitted that day that he took his hand out of the handhold and drove on that particular horse. Commissioner Graham stated that he is upset with Judge Hall not showing

up today. AAG, Guay stated that Mr. Cushing admitted to taking his hand out of the handhold. He thinks the Commissioners need to go to the next step which is to believe to excessive whipping. Mr. Cushing stated that it was not excessive and Judge Hall had the horse examined and they didn't find anything. AAG, Guay stated to the Commissioners that the only evidence you have is what Mr. Cushing has described to you. Commissioner Varney asked AAG, Guay that the ruling is for the excessive or discriminate use of the whip. Is that correct? AAG, Guay stated yes. Commissioner Graham agreed with Commissioner Varney. Commissioner McFarland stated that he feels they are held short by the judge. AAG, Guay stated that the motion is for lack of evidence of a violation under Chapter 7, Section 54 Q as defined in the rule. Commissioner McFarland made a motion that they dismiss the case based on the lack of evidence that they would need to make any other decision. Commissioner Graham seconded. Vote 4-0. AAG, Guay stated that Mr. Cushing made a motion for dismissal and the Commission did grant it.

- b. Appeal from Ronald Cushing Concerning Complaint Number 2015 MSHRC 096.** Mr. Cushing is appealing the November 3, 2015 decision of Presiding Judge Frank Hall, Jr. in which Judge Hall assessed a \$175 fine for an offense of MSHRC Rule of foot out of the stirrup. Ronald Cushing was present and representing himself. AAG, Guay stated that this is a de novo hearing and he qualified the Commissioners. Mr. Jennings stated that he had no witnesses and no tape. AAG, Guay asked if they had any objection to the proceeding up to this point. Both parties stated no. Mr. Cushing asked for a motion to dismiss for lack of evidence. Commissioner Varney asked for a motion. Commissioner Graham made a motion to dismiss for lack of evidence. Commissioner Reed seconded. Vote 3-1. Commissioner McFarland opposed.
- c. Appeal from Ronald Cushing Concerning Complaint Number 2015 MSHRC 097.** Mr. Cushing is appealing the November 6, 2015 decision of Presiding Judge Frank Hall, Jr. in which Judge Hall assessed a \$200 fine for an offense of MSHRC Rule of foot out of the stirrup. Ronald Cushing was present and representing himself. AAG, Guay stated that this is a de novo hearing and he asked questions of the Commissioners. AAG, Guay asked if both parties had any objection to the proceeding up to this point. Both parties did not object. Mr. Jennings stated that he had no evidence or witnesses and the video was not available. Mr. Cushing made a motion to dismiss for lack of evidence. AAG, Guay asked the Commissioners what their motion would be. Commissioner Reed made a motion for dismissal for lack of evidence. Commissioner McFarland seconded. Vote 4-0. Commissioner Graham asked AAG, Guay where do they go from here. AAG, Guay stated that the judge can be subpoenaed going forward. Mr. Cushing stated that there has been inconsistency of violations. Shouldn't these judges be held to a higher standard? Commissioner Varney stated that we have a very serious problem with the number of judges.
- d. Appeal from Howard Davis, Jr. Concerning Complaint Number 2016 MSHRC 07.** Mr. Davis is appealing the May 30, 2016 decision of Presiding Judge Frank Hall, Jr. in which Judge Hall assessed a placing of the horse Mr. Davis was driving in the 7<sup>th</sup> race at Bangor Raceway. Howard Davis, Jr. was present and representing himself. AAG, Guay gave Mr. Davis his oath. AAG, Guay qualified the Commissioners. He stated that this is a de novo hearing. Mr. Jennings stated that Judge Hall asked for a continuance. AAG, Guay stated that

Judge Hall requested to continue this case and he doesn't think there was ever a final disposition on the request. AAG, Guay ruled against the continuance because he doesn't find the witness to be necessary. The Commissioners would view the video tape and draw their own conclusion. AAG, Guay asked Mr. Davis if he had a motion. Commissioner Graham stated that he is concerned if they dismiss this and we had a horse placed someone already got paid the purse, where is the money coming from now to pay whatever this horse has moved up to. Mr. Jennings stated that the department writes a letter to the person that got the purse. Commissioner Graham stated that he has a real problem with that. AAG, Guay stated that if there is an appeal he thought the money was held until the disposition of the appeal. Mr. Jennings stated that he wasn't sure. AAG, Guay qualified Commissioner Willette. He explained where they were in Mr. Davis' case. AAG, Guay stated that the Commission is being asked if Mr. Davis violated the rule. Commissioner Varney asked if anyone had any questions or a motion. Commissioner Reed made a motion to dismiss this complaint as a result of lack of evidence. In order for a placement to have been made, there has to have been some sort of physical event during a race and they can't see that; therefore he moves that this matter be dismissed. Commissioner Graham seconded. Vote 5-0. AAG, Guay stated that the Commission made a motion to dismiss which they can and your appeal is granted.

- e. **Appeal from Howard Davis, Jr. Concerning Complaint Number 2016 MSHRC 13.** Mr. Davis Jr. is appealing the July 20, 2016 decision of Presiding Judge Frank Hall, Jr. in which Judge Hall assessed a \$125 fine for an offense of MSHRC Rule causing any horse or a field of horses to excessively slow down their speed. Howard Davis, Jr. was present and representing himself. AAG, Guay stated that the Commissioners have been qualified from the previous case. The department made a motion for a continuance filed by Judge Hall. He asked Mr. Jennings if the basis of the continuance the unavailability of witnesses. Mr. Jennings stated yes. AAG, Guay asked if these witnesses be personal fact witnesses or testifying about facts only known to them. Mr. Jennings stated no. Mr. Davis opposed the motion for a continuance. AAG, Guay denied the continuance because the basis of the motion is not sufficient to require a continuation of this proceeding. There were no objections from either party about the proceeding this far. There were no fact witnesses or video tape and the department did not subpoena Judge Hall. AAG, Guay asked Mr. Davis if he had a motion. Mr. Davis made a motion to dismiss for lack of evidence. AAG, Guay stated that he does not have authority to grant a motion to dismiss. That motion will be decided by the Commissioners. Commissioner Varney asked for any questions or a motion for Mr. Davis. Commissioner Graham made a motion to dismiss the case. Commissioner McFarland seconded. Vote 5-0. AAG, Guay stated to Mr. Davis that he appeal has been granted.

## **5. Other Business:**

- a. **Dismissal of Donna Sprague's violation that occurred on June 27, 2014.** Ms. Sprague's consent agreement for suspension and fine dated March 13, 2015 states that if Ms. Sprague has no violations of Chapter 11 between September 5, 2015 and the May 2016 meeting of the Commission, the violation that occurred on June 27, 2014 will be dismissed. Commissioner Graham asked if the fine and purse was paid. Mr. Jennings stated yes. Commissioner Willette made a motion to dismiss the case. Commissioner Graham seconded. Vote 5-0.

**b. Review of Title 8 Chapter 11 Statutes**

Mr. Jennings stated that he would try to summarize the issues on section 262. He would like some feedback on that issue. Commissioner McFarland stated that we are in dire need of judges. He also stated that he believes his understanding is that currently they take a USTA licensing examination. That's what qualifies them to be whatever position they are taking the exam for. As the state, we have them take a refresher course every two years. Mr. Jennings stated that the statute does not requirement that the judges take that USTA test. Commissioner Varney stated that we should proceed in that direction. AAG, Guay stated that the commission does license judges. The commission can take action on their license if they are violating their license. Commissioner Graham stated that we need to do something because if he was a driver and was getting penalized by the presiding judge in Bangor he would immediately appeal it because nothing will ever happen. Commissioner Varney asked if the department is going to subpoena for the next hearing. Mr. Jennings stated that apparently he has to. AAG, Guay stated that the department issues licenses and the licensee can come in front of the Commission and they can control the judges by putting them on probation. Mr. Jennings stated that in his other experience in licensing that there is action you can take against the license and that is what he finds sparse in the harness racing statute and rules. Commissioner Varney stated that he would say yes to put some language together. Mr. Jennings stated that he would move forward on Section 267 (1) on the budget. He also stated that in Section 267 (2) there are three reports that are filed with the commission and in his opinion they all contain accentually the same information. He would like to change the filing to one report. After discussion, they decided to revisit this issue. They also looked at Sections 272 C (2); 275 A (1); 277; 279 E; 283 and 299.

**c. Review List for Rulemaking**

Mr. Jennings stated that he made a minor change to Chapter 9. Chapter 7 and Chapter 11 are important to go forward with rulemaking. AAG, Guay stated that he would highly recommend on an expedited basis separate from any other changes that you make to Chapter 11 is that you add a clause to Chapter 11, Section 4, Subsection 4 as the rule currently says "a substance shall not be present in a horse in excess of a concentration at which the substance could occur naturally if it affects the performance of a horse. It shall be the responsibility of the commission to prove that the substance was in excess of the normal concentration". He would strongly suggest that you add "it shall be *prima facie* evidence that a substance affects the performance of a horse if it appears on the ARCI foreign substances". That would be a really good change to make pretty quickly because there are references in the rest of Chapter 11 about ARCI, but in terms from a rule perspective it does not cite a specific addition. Mr. Jennings stated that he had that rule drafted. He asked the Commission what they want him to work on. Commissioner Willette stated that Chapter 11 would be important to go forward with. AAG, Guay stated that he hasn't seen Mr. Jennings draft but the methodology that he is suggesting is not going to be controversial. It would be one sentence incorporated by reference of standard. He can't imagine that there would be a lot of comment that the rule would be susceptible to change via comment. He suggests no public hearing. Mr. Jennings stated that if five people write in and say that they want a public hearing than you have to start the process over. They decided to go with no public hearing on Chapter 11. Commissioner Graham stated that there are several rules to review. Ms. Perkins stated that there

was a group of people that met to review the rules and the biggest issue is Chapter 7. Mr. Jennings stated that he has some information about ideas around Chapter 7. He has a specific recommendation around Chapter 9. There is a huge amount of work to be done on Chapter 11. AAG, Guay stated that in terms of Commissioners communicating via email, any activity undertaking by the commission must be done in public. They can receive communications from you but its important when they respond that they don't respond with each other and copy. Mr. Jennings asked if the exchange of information is simply between the individual commissioner and he is that going to contradict. AAG, Guay stated that to the extent that you can isolate your feedback and not give each of these commissioners the feedback of other commissioners; he thinks that is ok but that will take quite a bit of discipline. AAG, Guay suggested to Mr. Jennings to poll the Commissioners on what they have heard or what stands out in their mind. Commissioner Willette stated that having mandatory minimum fines but then allowing mitigating circumstances. The second thing is he doesn't understand with the world of drug testing and with things coming back how we are giving purse money the day of a race when there is an appeal period for three days and we get a drug test a week or so later. At that point our recovery affords aren't most effective. The third is these suspensions for the trainer's. In his opinion you need to hold the horse back. Commissioner McFarland stated that the purse checks are critical. All of the fairs will do whatever is necessary under the law. He thinks someone should be identified as the clearing agent for these treasurers on that third day to notify these venues to release those checks. He does agree with Commissioner Willette to suspend the horse. Commissioner Graham agrees with Commissioner McFarland. He also feels they opened up a can of worms with Mr. Davis's case. Commissioner Varney agrees with the other Commissioners.

**d. Summary of Unpaid Purses**

Commissioner Varney stated that they would review the list of unpaid purses. Mr. Greenleaf passed out to the Commissioners a list of unpaid purses. He stated that everyone has been notified. The list was reviewed and discussed.

**6. Executive Director's Report**

Commissioner Varney asked for the executive director's report. Mr. Jennings stated that there were fewer legs for the sire stake races. There was \$5,000.00 more to be used for the finals.

Mr. Jennings stated that there were complaints about the track officials. AAG, Guay stated that the Commission can warn them if they continue to do whatever the complaint is. Commissioner McFarland stated that also applies to all employees that work for this commission and department. Ms. Perkins stated that there are not enough officials at the racetrack and they need competent officials. Commissioner McFarland stated that he agrees with Ms. Perkins that these officials need to be competent. AAG, Guay stated that in Chapter 17 you have a list of violations and the level 4 violation says using offensive and profound language. That's for any person's license and that could be brought against that person. Mr. Jennings stated that he is getting complaints regarding the OTB's and when they are opened. He is also setting up meetings with the industry about formulating strategies around improving the overall health and viability of the harness racing commission. He stated that he needs some more administrative help. He can contract that out to manage all these details of keeping track of all the test.

**7. Public Comment**

Ms. Perkins stated that for the two year old finals there was \$68,000.00 left over. There were some people complaining about racing under lights. She would also like to have the horses in the correct stalls. Ms. Perkins stated that Bangor did an excellent job for the finals. On August 11, 2016, the MSBOA had their meeting about the Sire Stakes Program. Out of that meeting they were asked to do a survey and they received 70 surveys back regarding the breeding of horses. She also asked Mr. Jennings to advertise for the Sire Stakes Advisory Committee. Ms. Perkins also explained what had happened at Bangor with the also eligible horse.

Commissioner McFarland stated that he would like to thank the MHHA and the MSBOA for their support of the Windsor Fair and all of the fairs.

**8. Schedule of Future Meetings:**

September 23, 2016

October 13, 2016 and October 21, 2016

November 18, 2016

December 8, 2016

**9. Adjourn**

1:10 p.m.